Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-845

RAYMOND J. PENOLI, JR.
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the
State of California

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November 21, 1978.

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Petitioner, Raymond Joseph Penoli, Jr., prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Appellate District, entered June 28, 1978, affirming his conviction under California Penal Code Section 459 (auto burglary), and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

An unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, affirming the conviction of the Defendant is attached hereto as Appendix C.

The Order of the Court of Appeal, in postcard form, denying Defendant's Petition for a Rehearing is also at-

tached hereto as Appendix B. The Judgment of the California Supreme Court denying Defendant's Petition for a Hearing in that Court is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeal was entered June 28, 1978. A timely Petition for Rehearing was filed, and was denied on July 26, 1978. This judgment of the Court of Appeal became final on July 28, 1978. A timely Petition for Hearing was filed in the California Supreme Court, and was denied on August 24, 1978. This judgment of the California Supreme Court became final on August 28, 1978. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, in light of *United States v. Chadwick* (1977) 433 U.S. 1, it is a violation of the Fourth Amendment for police to conduct a warrantless search of a locked trunk of an impounded automobile when probable cause exists to believe the trunk contains contraband, but there are *no* exigent circumstances justifying an immediate, warrantless search, and a search warrant could readily be obtained.

2. Whether the "instrumentality" doctrine adopted by California allowing warrantless searches of automobiles or other objects in their entirety which are themselves "evidence" of the commission of a crime is a violation of the Fourth Amendment.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On October 14, 1976, the District Attorney of San Luis Obispo County filed a complaint against Petitioner and a Co-Defendant named Thomas Decker charging them with one count of auto burglary (California Penal Code Section 459) and one count of receiving stolen property (California Penal Code Section 496). A preliminary examination was held on these charges on February 3, 1977, at which time the testimony and evidence introduced revealed the following facts:

On October 10, 1976, at approximately 10:00 a.m., Mr. Warren Davey, a resident of Santa Barbara County, walked out onto the balcony of his second floor motel room in Shell Beach and noticed a white Cadillac El Dorado with a black top parked behind his 1970 Lincoln automobile. The right front door of the Cadillac was open opposite the trunk of Davey's car and the Co-Defendant Decker was standing between the two (2) cars, his hands in the vicinity of the trunk lid which was opened about four (4″) inches.

As Davey looked on, Decker glanced up at him standing twenty (20′) feet above and then turned around and

starting talking to Petitioner Penoli who was seated inside the white Cadillac and, at the same time, Decker, sat on the trunk of Mr. Davey's automobile, closing the trunk lid. After briefly speaking with Penoli, Decker walked directly from Mr. Davey's car to the white Cadillac and got in on the passenger's side. Mr. Davey did not see either of the Defendants place anything into the trunk of the Cadillac nor even go near the area of the trunk while the Cadillac was parked in the lot. After Mr. Decker entered the Cadillac, the Defendants drove out of the parking lot and down the street across from the motel. Davey then checked the contents of the trunk and discovered his camera and his camera case, his wife's coat and an overnight case were missing. He had locked these items in the trunk of his car the night before.

Davey telephoned the local police and reported that he believed someone had gotten into the trunk of his car and taken his camera case and that the responsibles were two (2) men in a white Cadillac El Dorado with a black top.

Upon receiving this information from Mr. Davey, the Pismo Beach Police Department broadcasted a "Be on the lookout notice" indicating that a "black over white Cadillac . . . had just been involved in a 459 auto at Spyglass Motel in Shell Beach." The broadcast also indicated that the occupants of said Cadillac were "two white male subjects, one with light-colored hair". At approximately 10:30 a.m., Officer Griffith, a reserve police officer for the Pismo Beach Police Department, observed a black over white Cadillac proceeding southbound on Price Street. Inside the Cadillac were two (2) male occupants, one (1) of which, the driver, had light-colored hair. Officer Griffith radioed for back-up

assistance from Officer Holt and then followed the Cadillac onto Highway 101. After following the Cadillac for approximately a mile and one-half (1½), Officer Griffith stopped the vehicle and ordered Decker, who was driving, to get out of the vehicle and step to the rear of the Cadillac. At this time Officer Holt arrived at the scene and alerted the police dispatcher to summon the victim, Davey, to the location. Approximately five or ten (5-10) minutes later Davey arrived, identified himself to Officer Holt, and related the activities of the Defendants that he had observed from the second floor motel room. Mr. Davey also told Officer Holt that he had not seen the Defendants take anything out of the trunk of his automobile nor had he seen them put anything into the trunk of their Cadillac.

Immediately after talking with Mr. Davey, Officer Holt placed both Defendants under arrest for burglary, at which time they were handcuffed and placed in separate police vehicles. A search of the interior of the Cadillac at the scene of the arrest produced no contraband or stolen property. Thereafter, Officer Holt asked Mr. Davey to come down to the police department and give a written statement concerning the incident. Officer Holt made no attempt at that time to determine Mr. Davey's residence nor how long Mr. Davey would be in town. At no time did any police officer ask Mr. Davey to sign an affidavit for a search warrant.

Following their arrest, the Defendants were transported to the jail for identification and booking and the white Cadillac was taken to a service station in the City of Pismo Beach and impounded. Approximately one hour later, Officer Holt caused the locked glove compartment and trunk

of the Defendants' vehicle to be forced open by a locksmith. At the time the trunk was forced open, the Defendants were in custody at the jail and were in the process of being booked. The white Cadillac itself had been "impounded" and could not have been released to anyone nor removed from the service station without the express permission of Officer Holt. Mr. Davey was still available to sign an affidavit for a search warrant but nothing was requested of him. In addition, a magistrate was available for the purposes of signing a search warrant had one been requested, and a District Attorney was available to help in the preparation of an affidavit for a search warrant had one been requested by Officer Holt. No attempt was made, however, to obtain a search warrant for the search of the locked glove compartment or trunk. A search of the trunk produced the evidence supporting the conviction of Petitioner for auto burglary.

Based on the foregoing facts, Petitioner moved at the preliminary examination to suppress the evidence seized from the locked trunk on the grounds that the warrantless search violated the provisions of the Fourth Amendment. This motion was denied and the Defendants were held to answer to the Superior Court.

On May 2, 1977, Defendants filed in the Superior Court a motion for a hearing *de novo* on the validity of the warrantless search of the locked trunk of the automobile. On May 20, 1977, the motion was submitted on the transcript of the Preliminary Examination, argued, and denied.

On June 10, 1977, the Defendants withdrew their previously entered pleas of not guilty and entered pleas of guilty to one (1) count of auto burglary (Penal Code Section

459). In addition, it was stipulated by the prosecution and defense that the evidence supporting such charge was the physical evidence seized from the locked trunk of the automobile following the warrantless search. The Defendants appealed their convictions under California Penal Code Section 1538.5(m) which allows appellate review of suppression motions even though a plea of guilty is the basis for the conviction.

On June 21, 1977, this Court issued its opinion in *United States v. Chadwick* (1977) 433 U.S. 1 holding that the warrantless search of a locked, impounded footlocker reasonably believed to contain contraband was a violation of the Fourth Amendment in the absence of exigent circumstances. This case was not relied upon by Petitioner in his pre-trial suppression motions because it had not yet been issued. Petitioner did, however, cite and rely upon this authority in his briefs submitted to the California Court of Appeal and the California Supreme Court.

Petitioner seeks review of the affirmance of his conviction and requests an outright reversal thereof.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of the law of search and seizure that should be resolved. In *Carroll v. United States* (1925) 267 US. 132, this Court announced the rule that law enforcement officers may, because of the inherent mobility of an automobile, make a warrantless search of a vehicle stopped on the highway, given probable cause to believe the vehicle contains contraband. Since that time, although the so-called "automobile exception" to the warrant requirement has been expanded greatly, this

Court has also lent greater recognition to the importance of an individual's right to privacy upon the grounds that the Fourth Amendment "protects people, not places." *Katz v. United States* (1967) 389 U.S. 347, 351.

Based upon this recognition of a right to privacy, this Court held in *United States v. Chadwick* (1977) 433 U.S. 1 that a warrantless search of a locked and impounded footlocker was unlawful. Although this protection was not extended to automobiles because of a "diminished expectation of privacy", the actual issue was apparently not before the Court. Petitioner submits, however, that individuals do have the same expectation of privacy concerning locked areas of their cars as they do their luggage. Vehicles have, in the modern life style of the average American, become irreversibly intertwined with his daily and personal activities as well as the repository for personal effects. People today spend a great deal of time in their vehicles, not only driving from place to place, but in performing various activities along the way or upon reaching their destinations. Cars are often used for private activities, and drivers put items in the closed-off areas of the car to keep them secret. Using the car as a protected container, under lock and key, is general in American society. Thus, a search thereof is an invasion of the social expectation of secrecy, just as a seizure is an invasion of the expectation of control.

In addition, Petitioner submits that there are no differences whatsoever between the locked trunk of an automobile and a locked footlocker once either of these items has been impounded by police authorities. For example, both the exterior of the car and the exterior of the footlocker are open to public view and yet both are secured by locking devices to maintain the integrity of their contents. Once an automobile has been impounded in police custody it has no more mobility than the motorless footlocker. Unless true exigent circumstances exist for an immediate search (explosives, bodies, evidence that will deteriorate in a short space of time, etc.), Petitioner submits that a warrant should be obtained before conducting the search. Obviously, no such urgency was shown in the instant case because *both* of the occupants of the vehicle had been arrested and were in custody at the police station, there were no unaccounted for suspects, the car was in police custody, and there was no reason to believe that the trunk contained explosives or evidence that might deteriorate if not reached immediately.

2. In California, it has been held that a vehicle about to be used to flee the scene of a crime is an instrumentality of the crime. *People v. Laursen* (1972) 8 Cal.3d 192. The present case serves as a further illustration of the manner in which the instrumentality doctrine is applied in California. The vehicle in this case was seized as a getaway car; the District Court of Appeal, citing *People v. Laursen, supra,* reasoned that the vehicle was an instrumentality of the crime and thus the police were "entitled to conduct an immediate warrantless search of all areas of the car."

The instrumentality doctrine as developed in California, however, cannot be reconciled with this Court's decision in *United States v. Chadwick, supra.* Otherwise, the vehicle in *Chadwick* could have been characterized as an instrumentality of a crime, so that the vehicle together with its contents, including the locked footlocker, would have been subject to a warrantless search. But in the instrumentality situation, as in the probable cause situation, one still has a

reasonable expectation of privacy in his automobile and its contents. It is the privacy interest in, and not the *use* made of, the automobile which should be the critical factor in determining whether police may subject the vehicle and its contents to a warrantless search. The instrumentality doctrine ignores this element of privacy, focusing exclusively on the use made of the vehicle. This Court should therefore repudiate this ill-conceived doctrine because it does not, indeed cannot, protect persons from unreasonable governmental intrusion into their legitimate expectations of privacy with regard to automobiles and their contents. The fact that a vehicle may be tenuously connected to the arrest of the Defendants and the crime should not be used as a circumstance to swallow up the mandate of the Fourth Amendment under the pretext of an "exception" to the provisions of that Amendment.

Respectfully submitted,

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Oakland, California 94612
Counsel for Petitioner

(Appendices Follow)

APPENDIX

APPENDIX A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

August 24, 1978

I have this day filed Order HEARING DENIED

In re: 2 Crim. No. 31380

People

vs.

Decker and Penoli

Respectfully,

G. E. Bishel
Clerk

APPENDIX B

Post Card

Clerk's Office
Court of Appeal
Second District

3580 Wilshire Boulevard
Suite 301
Los Angeles, CA 90010

Dennis M. Sullivan
One Kaiser Plaza #1115
Oakland, 94612, California

Los Angeles, Cal. July 26, 1978

Title

People

vs.

Decker, et al

No. 31380

The Court: Petition for rehearing is denied.

Clay Robbins, Clerk

APPENDIX C

Not To Be Published In
The Official Reports
In the Court of Appeal of the State of California

Second Appellate District

Division Three

2d Crim. No. 31380
(Sup. Ct. No. 10226)

The People,
Plaintiff and Respondent,
v.
Thomas Leroy Decker and
Raymond Joseph Penoli,
Defendants and Appellants.

[Filed June 28, 1978]

THE COURT*

Codefendants, Thomas Leroy Decker and Raymond Joseph Penoli, pleaded guilty to second degree burglary (Pen. Code, § 459). Prior thereto they unsuccessfully moved to suppress evidence (Pen. Code § 1538.5). They appeal, contending in essence, that (1) their initial detention was illegal, (2) they were arrested without probable cause, and (3) the warrantless search of their vehicle after it was impounded was unlawful.

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*Before Klein, P. J., Cobey, J., and Allport, J.

We review the evidence in the light most favorable to the order denying suppression as is required by the usual rule governing appellate review. (*People v. James*, 19 Cal. 3d 99, 107.) On October 10, 1976, at about 10:00 a.m. Warren Davey was standing on the second floor balcony outside of his room at the Spyglass Motel in Pismo Beach when he noticed that appellants' Cadillac automobile was parked perpendicular to the rear of his car. The right front door of the Cadillac was open opposite the trunk of Davey's car and appellant Decker was standing between the two cars, his hands holding the trunk lid which was opened about four inches.

As Davey looked on, Decker glanced up at him standing 20 feet above and immediately closed the trunk lid. After briefly speaking with appellant Penoli, who was seated behind the steering wheel of the Cadillac, they drove away. Davey then checked the contents of the trunk and discovered his camera and camera case, his wife's coat and an overnight case were missing. He had locked these items in the trunk of his car the night before.

Davey telephoned the local police and reported, "I believe someone had gotten into my trunk and taken my camera case." He described the car and its occupants as "a white Cadillac, El Dorado, with a black top and had two men inside, and one of them was six feet and light hair, light sandy hair, and the other one was roughly six feet and had dark hair." Shortly thereafter Pismo Beach Officer David Griffith received a bulletin over his police radio to "be on the lookout for a black over white Cadillac that had just been involved in a 459 auto at Spyglass Motel . . . [con-

taining] two male occupants . . . one with light-colored hair."

At approximately 10:30 a.m. Officer Griffith observed appellants in the Cadillac heading south from Pismo Beach on Interstate Highway 101. He ordered Decker, who was driving, to stop and exit the car. At this time Officer Gary Holt arrived at the scene and alerted the police dispatcher to summon the victim, Davey, to the location. Approximately five or ten minutes later Davey arrived, identified himself to Officer Holt, and make a positive identification of appellants and their car. Appellants were arrested and searched[1] and their car was impounded at a nearby gas station. One hour later Officer Holt had a locksmith open the trunk and recovered Davey's property.[2]

The contention that Officer Griffith had insufficient information to detain appellants is meritless. In the instant matter, Officer Griffith obtained knowledge through "official channels" that a burglary had taken place a short time before observing appellants on the highway. He knew the general description of the suspects and the car used by them. From this set of facts, Officer Griffith could "reasonably entertain a sufficient good faith suspicion to warrant a detention of the occupants for investigative purposes." (*People v. Flores*, 12 Cal.3d 85, 91; *People v. Waters*, 30 Cal.App.3d 354, 361.) Further, since Griffith was the first officer on the scene to confront appellants, he was justified in requiring Decker to alight from

[1]A search of Decker's jacket pocket uncovered a set of altered automobile keys used for "picking" locks on cars.

[2]The locked glove box was also opened and searched but no seizable evidence was found therein.

the car as a safety precaution. (See *People v. Ortega,* 2 Cal. App.3d 884, 892; *People v. Figueroa,* 268 Cal.App.2d 721, 726-727.)

Appellants' argument that the victim was an unreliable informant and the information he supplied was insufficient to constitute probable cause to arrest them is meritless. Prior to arresting appellants, Officer Holt had the victim, Davey, summoned to the detention location. When he arrived the victim provided Officer Holt with a detailed description of the crime and made a positive identification of the car and appellants. Mr. Davey, as a citizen-informant, is presumed to be reliable and there is nothing contained in this record to challenge his credibility. (*People v. Ramey,* 16 Cal.3d 263, 269.) We find the information supplied by Davey amply supports the court's finding that probable cause to arrest appellants existed. (See *People v. Ramey, supra,* at pp. 269, 270; *People v. Amos,* 70 Cal.App.3d 562, 566-567.)

Lastly, appellants contend that the warrantless search of their impounded vehicle was unlawful. Here appellants were stopped on the highway driving away from the city only one-half hour after the burglary was reported. Under these circumstances the officers had reason to believe appellants had not yet disposed of the stolen goods and the items were probably concealed somewhere in the car. (See *People v. Dumas,* 9 Cal.3d 871, 885.) They were then entitled to conduct an immediate warrantless search of all areas of the car. (*People v. Laursen,* 8 Cal.3d 192, 201.) The fact that the trunk was opened and searched only after appellant's car was removed from the open highway

and impounded does not invalidate the search. (*People v. Hill,* 12 Cal.3d 731, 751 and cases therein; *People v. Stafford,* 29 Cal.App.3d 940, 947.)

The judgments[3] are affirmed.

Not to be published in the Official Reports.

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[3]Appellant Decker was granted probation, an order deemed a judgment for appellate purposes. (Pen. Code, § 1237.)